

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF OREGON

KARL WISE,

Civil No. 07-6342-AA
OPINION AND ORDER

Plaintiff,

vs.

SWIFT TRANSPORTATION CO., INC.,
a foreign corporation;
INTERSTATE EQUIPMENT LEASING
INC., an Arizona corporation;
and BRUCE MARK PISTONE,

Defendants.

vs.

SWIFT TRANSPORTATION CO., INC.,
a foreign corporation;
INTERSTATE EQUIPMENT LEASING
INC., an Arizona corporation;
and BRUCE MARK PISTONE,

Third-Party Plaintiffs,

vs.

SPECIALIZED TRANSPORTATION,
INC., an Indiana corporation;
and STEVEN RODNEY MURRAY,
Third-Party Defendants

vs.

STEVEN RODNEY MURRAY,
Third-Party Defendant/
Counterclaim Plaintiff,

vs.

SWIFT TRANSPORTATION CO., INC.,
a foreign corporation;
INTERSTATE EQUIPMENT LEASING
INC., an Arizona corporation;
and BRUCE MARK PISTONE,
Third-Party Plaintiffs/
Counterclaim Defendants

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AIKEN, Chief Judge:

Plaintiff moves for partial summary judgment pursuant to

Fed. R. Civ. P. 56 for dismissal of defendants' first affirmative defense. Plaintiff's motion is granted.

BACKGROUND

Plaintiff, Karl Wise, filed suit against defendants Bruce Pistone, Interstate Equipment Leasing, Inc. (IEL), and Swift Transportation Co., Inc. (Swift) for personal injuries arising out of a tractor-trailer accident that occurred on February 10, 2007, near Pendleton, Oregon, on Interstate 84. There is no dispute that plaintiff was injured in the accident. Plaintiff has requested \$13,500,000 in damages from defendants. Defendants subsequently filed a third-party complaint against third-party defendants Specialized Transportation, Inc., and Steven Murray alleging indemnity and contribution.

On December 11, 2009, this court granted third-party defendants' motion for summary judgment finding they were immune from liability for contribution and indemnity by operation of Nevada's workers' compensation law. In November 2010, this court granted third-party defendants' motion for entry of judgment of dismissal pursuant to Fed. R. Civ. P. 54(b), and dismissed third-party defendants Specialized Transportation, Inc., and Steven Murray from this lawsuit.

STANDARDS

Summary judgment is appropriate "if the pleadings, the discovery and disclosure materials on file, and any affidavits

show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(c). Substantive law on an issue determines the materiality of a fact. T.W. Electrical Service, Inc. v. Pacific Electrical Contractors Assoc., 809 F.2d 626, 630 (9th Cir. 1987). Whether the evidence is such that a reasonable jury could return a verdict for the nonmoving party determines the authenticity of a dispute. Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248 (1986).

The moving party has the initial burden of establishing the absence of a genuine issue of material fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). If the moving party shows the absence of a genuine issue of material fact, the nonmoving party must go beyond the pleadings and identify facts which show a genuine issue for trial. Id. at 324.

Special rules of construction apply when evaluating summary judgment motions: (1) all reasonable doubts as to the existence of genuine issues of material fact should be resolved against the moving party; and (2) all inferences to be drawn from the underlying facts must be viewed in the light most favorable to the nonmoving party. T.W. Electrical, 809 F.2d at 630.

DISCUSSION

Plaintiff filed a motion for partial summary judgment on defendants' first affirmative defense alleging that plaintiff, a

passenger, contributed to his injuries in the following ways: failed to keep a lookout; failed to advise the driver, Steven Murray, to operate the truck at a reasonable speed; failed to warn Murray to maintain control of the truck; failed to warn Murray of the hazard; failed to take action in response to defendant Pistone's radio message; failed to pay attention to ODOT warnings about the weather and driving conditions; and failed to have the CB radio on and/or set to receive incoming messages.

The parties do not dispute the following evidence: plaintiff drove the truck from Everett, Washington to Ellensburg, Washington where Murray took over the driving. Plaintiff then climbed into the sleeper berth until approximately five minutes before the collision. Plaintiff awoke when he felt the truck downshift, lowering the speed as it pulled up to the grade of Cabbage Hill. Plaintiff then exited the sleeper berth, climbed into the passenger seat, put on his seatbelt, and bent over to put on his shoes. When he finished putting on his shoes, he looked up, and saw through the fog a trailer truck in their lane of travel. When he realized the truck was not moving, he shouted, "look out!" at the same moment that driver Murray swerved left and hit the left rear corner of the Swift truck with the front corner of the STI truck. Plaintiff was ejected from the truck and injured.

I find that under Oregon law, plaintiff, as a passenger, did not have any of the "duties" listed above. A co-driver who is off-duty at the time of a collision is considered a passenger. Such a passenger under Oregon law does not have a duty to keep a look-out or effect any control over the vehicle's operation. Eggiman v. Young, 260 Or. 261, 266-67, 490 P.2d 172 (1971). See also, Brawner v. Richardson, 57 Or. App. 178, 181, 643 P.2d 1365 (1982) ("In general a passenger has no duty to keep a lookout or to effect any control over the vehicle operation."). "Save in exceptional situations, a guest or passenger in a vehicle is not required to keep a constant lookout or to see to it that he shall be in a condition do so." Restatement (Second) of Torts, § 495 cmt. c (1965). The only duty plaintiff had under Oregon law was to "exercise such care as an ordinarily prudent person would exercise under like circumstances" for purposes of protecting his or her own safety. Brawner, 57 Or. App. at 184. In exercising ordinary prudent care, a passenger may "take his attention off the road to look at the scenery or may turn around to speak to a friend in the back, or he may go to sleep or read a book, without being guilty of contributory negligence." Restatement (Second) of Torts, § 495 cmt. c. As the non-moving party, defendants have the burden to set forth specific facts demonstrating a genuine factual issue showing any exceptional circumstances. Matsushita Elec. Indus. Co. v. Zenith Radio

Corp., 475 U.S. 574, 587 (1986). Defendants fail to produce any such evidence. See Villiarimo v. Aloha Island Air, Inc., 281 F.3d 1054, 1061 (9th Cir. 2002) ("[T]his court has refused to find a 'genuine issue' where the only evidence presented is 'uncorroborated and self-serving testimony.'"). Here, just prior to the collision, there is no dispute that plaintiff was asleep in the sleeping berth. Just five minutes prior to the collision, plaintiff emerged, climbed into the passenger seat, fastened his seatbelt and proceeded to bend down to put on his shoes. When he looked up and saw that the truck in their lane was not moving, he shouted a warning, "look out!" to Murray. Plaintiff exercised the ordinary prudent care reasonably expected of a passenger.

As a matter of law, I fail to find any duty that plaintiff breached while riding as a passenger in the truck.

CONCLUSION

Plaintiff's motion for partial summary judgment (doc. 162) is granted and defendants' first affirmative defense is dismissed. Oral argument is denied as unnecessary.

IT IS SO ORDERED.

Dated this 14 day of January 2011.

/s/ Ann Aiken
Ann Aiken
United States District Judge